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Supreme Court, U.S.
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CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

RALPH COYLE, WARDEN,

Petitioner

vs.

DAVID A. MAPES

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME I

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APPENDIX A

Filed 4/30/99

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 96-4189/96-4196

DAVID A. MAPES,
Petitioner-Appellee/Cross-Appellant,

vs.

ARTHUR TATE, WARDEN
Respondent-Appellant/Cross-Appellee.

JUDGES: BEFORE: RYAN, SILER, and DAUGHTREY, Circuit Judges.

OPINION: ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

APPENDIX B

Filed: 3/24/99

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 96-4189, 96-4196

DAVID A. MAPES,
Petitioner-Appellee/Cross-Appellant,

vs.

RALPH COYLE, WARDEN
Respondent-Appellant/Cross-Appellee.

Argued Jan. 27, 1998.

Decided March 24, 1999.

Before: RYAN, SILER, and DAUGHTREY, Circuit Judges.

RYAN, J., delivered the opinion of the court, in which DAUGHTREY, J., joined. SILER, J., delivered a separate opinion concurring in part and dissenting in part.

OPINION BY: RYAN, Circuit Judge.

Warden Ralph Coyle appeals from the recommendation by a federal magistrate judge, adopted by the district court, that a conditional writ of habeas corpus should issue barring Ohio from carrying out the death sentence imposed on petitioner David A. Mapes by an Ohio state court. Mapes cross- appeals the denial of his habeas petition concerning his judgment of conviction. We find that, with one possible but important

exception, Ohio courts did not deprive Mapes of any constitutionally guaranteed right. The exception is the significant likelihood that Mapes's appellate counsel was unconstitutionally ineffective. Thus, while we must affirm the district court's rejection of Mapes's challenge to his conviction, we will remand so that the district court can determine, in an evidentiary hearing, whether the performance of Mapes's appellate counsel fell below the constitutional minimum.

I. PROCEDURAL HISTORY

A.

On the morning of January 30, 1983, two or three armed men entered Chap's Bar in Cleveland, Ohio, and attempted to rob its employees. In the course of the robbery, one of the owners of the bar, John Allen, was shot and killed. Later, upon hearing news accounts of this crime, a Cleveland man contacted the police and indicated that David Mapes had earlier attempted to recruit him to help commit the robbery at Chap's. The police then showed Mapes's photo, in a photo array, to one of the survivors of the robbery. That person, John Hovekamp, selected three photos that resembled the gunman; one was of Mapes. Mapes was arrested and placed in a lineup. Hovekamp positively identified him as the Chap's gunman.

Mapes admitted that he had participated in the robbery, but claimed that he was not the gunman. However, Mapes's accomplice testified at trial that Mapes was the shooter, as did another survivor, Ronald Rucci. Mapes's wife and a neighbor testified at trial that Mapes owned a sawed-off shotgun like the one used at Chap's, and police found shells, of the same type used to kill Allen, in a drainpipe hole at Mapes's apartment. Not surprisingly, an Ohio jury convicted the petitioner of aggravated murder.

Mapes had been charged with a death penalty "specification" alleging that he had previously been convicted of an offense, an essential element of which was the purposeful killing of another. This specification was tried to the judge alone. Because Mapes had pleaded *non vult*, or "no contest," in 1972 to a charge of murder in New Jersey, the Ohio trial court found Mapes guilty of the specification. One of Mapes's habeas corpus assignments of error is that the trial court wrongly excluded evidence that Mapes was not the "triggerman" in the New Jersey killing. Mapes did not, however, contest the fact that he had previously been convicted of murder.

The trial court's finding regarding the prior conviction made Mapes preliminarily "eligible" for the death penalty and required that the jury hear evidence regarding seven statutory aggravating and mitigating factors and, based on its determination whether the aggravating factors outweighed the mitigating factors or vice versa, recommend to the court that Mapes should or should not be sentenced to death. The only evidence of mitigation Mapes submitted was his unsworn statement that he was only 18 years old at the time of the New Jersey murder, that the conviction was really for manslaughter in light of the sentence he received, and that he was not responsible for the actual shooting. In rebuttal, the prosecutor emphasized the fact that Mapes's statement was unsworn--thereby preventing cross-examination--and argued that the statement was irrelevant in any case. The court then instructed the jury that it must reach unanimity on whether to recommend the death penalty before it could consider a recommendation of a term of imprisonment. Ultimately, Mapes was sentenced to death.

B.

A new attorney was appointed to represent Mapes on his direct appeal to the Ohio Court of Appeals, and counsel

brought 12 assignments of error. Of the 12, 11 pertained to the guilt phase of trial. In the only sentencing argument, Mapes alleged that, by commenting on the fact that his mitigation statement was unsworn, the prosecutor had infringed on Mapes's Fifth Amendment right to remain silent. Appellate counsel did not raise several sentencing issues about which trial counsel had made contemporaneous objections. Mapes's judgment of conviction and his death sentence were affirmed by the Ohio Court of Appeals, *State v. Mapes*, No. 47191, 1984 WL 5285 (Ohio Ct.App. Oct. 25, 1984), and they were affirmed again upon appeal to the Ohio Supreme Court, *State v. Mapes*, 19 Ohio St.3d 108, 484 N.E.2d 140 (Ohio 1985).

C.

Mapes then obtained a third attorney, and petitioned the trial court for post- conviction relief. That counsel argued that Mapes's trial and appellate lawyers had both rendered ineffective assistance, and that the trial court had committed seven reversible errors. The trial court declined to grant relief,, ruling that it had no authority to overrule the court of appeals' affirmance of Mapes's conviction and sentence. The court of appeals affirmed the trial court's decision, holding that the trial judge had correctly refused to pass on Mapes's assignments of error. *State v. Mapes*, No. 56608, 1990 WL 20864 (Ohio Ct.App. Mar. 8, 1990). Finally, the Ohio Supreme Court dismissed Mapes's appeal from the denial of post-conviction relief, ruling that "no substantial constitutional question" existed. *State v. Mapes*, 53 Ohio St.3d 703, 558 N.E.2d 57 (1990).

D.

On January 10, 1991, Mapes filed his habeas corpus petition in the federal court. He brought 15 assignments of constitutional error. The petition was referred to a magistrate

judge who declined to address the constitutional merits of many of these, for the reason that seven of the assignments of error presented in Mapes's habeas petition were not presented on his direct appeal, and thus were deemed precluded by Ohio courts on post-conviction appeal. That is, an adequate and independent state-law ground existed for denying relief even if Mapes's trial was constitutionally flawed.

Of the remaining eight assignments of error, the magistrate judge recommended that all but one be dismissed. The only claim credited by the magistrate judge was that Mapes had received ineffective assistance of appellate counsel by virtue of counsel's failure to argue on direct appeal that the trial court had impermissibly precluded the jury from considering mitigating factors relating to the prior guilty plea Mapes had entered in New Jersey. Thus, the magistrate judge recommended a grant of Mapes's petition unless Ohio courts granted another review within 90 days. The district court agreed, and this timely appeal followed.

II. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996, or AEDPA, was signed into law on April 24, 1996. Pub.L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §2254 (1996)). However, it does not apply to habeas petitions pending on that date. See *Lindh v. Murphy*, 521 U.S. 320, 321-23, 117 S.Ct. 2059, 2061, 138 L.Ed.2d 481 (1997); *Rickman v. Bell*, 131 F.3d 1150, 1154 (6th Cir.1997), *cert. denied*, --- U.S. ----, 118 S.Ct. 1827, 140 L.Ed.2d 962 (1998). Because Mapes's habeas petition was filed in 1991, the pre-AEDPA standard of review applies, which we recently summarized in *Rickman*. That is, primary, or historical, facts found by state courts are presumed correct and are rebuttable only by clear and convincing evidence. Determinations of law, or determinations involving mixed questions of fact and law, however, receive de novo review. *Rickman*, 131 F.3d at 1153.

III. ANALYSIS

A. Substantive Trial Error

Mapes argues in his habeas appeal that the trial court committed a number of reversible errors. He contends that the trial court misinstructed the jury on several matters; that the jury was allowed to return inconsistent verdicts at the guilt phase; that the jury was allowed to return a non- unanimous verdict at the sentencing phase; that the trial court was biased against Mapes and committed judicial misconduct; and that the court wrongly excluded relevant evidence at the bench trial on the prior-murder-conviction specification. Of course, we are concerned only with errors of constitutional dimension; moreover, even constitutional errors will not be noticed if an adequate and independent state-law ground exists for upholding the conviction or sentence. *See Wainwright v. Sykes*, 433 U.S. 72, 86-87, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Upon a careful review of the record and the parties' briefs, we conclude that Mapes is foreclosed from bringing most, but not all, of the alleged assignments of error because he failed to raise them in Ohio courts--and this failure is an adequate and independent ground for affirmance.

Since the central issue before us is whether, as the federal district court found, Mapes's appellate counsel was constitutionally ineffective for failing to raise several alleged trial errors, we must first determine whether the trial court in fact erred. If it did not, there can be no constitutional deficiency in appellate counsel's failure to raise meritless issues. If the trial court did err, the questions then become whether appellate counsel was constitutionally ineffective for failing to raise those errors on appeal and, if so, whether the petitioner was prejudiced by counsel's unsatisfactory representation. We shall address those questions in due course, but we must, of course, first examine Mapes's

allegations of error, even though, on their own merits, they may be defaulted.

1. Jury Instructions

Mapes contends that the trial court instructed the jury erroneously in the following ways:

The trial judge repeatedly told the jury that its job was merely to recommend a sentence. The intent and actual effect of this misleading instruction was to diminish the jurors' sense of responsibility and increase the likelihood of a death verdict. This was error because a "recommendation" not to impose the death penalty would be binding on the court, and because Ohio trial courts almost never reject a death recommendation.

The trial judge specifically instructed the jury that a gun specification was a death specification. It is not. Under Ohio law, it is irrelevant whether the erroneous instruction misled the jury, because precedent requires reversal if such error occurs.

The jury was instructed that it had no discretion in making its sentencing recommendation if aggravation was found to outweigh mitigation. Even if the jury found the aggravating circumstance of the prior killing to outweigh any mitigating factors, it should have been able to exercise merciful discretion and recommend against the death penalty.

The jury was given "acquittal-first" penalty-phase instructions. That is, the jury was instructed that it had to reach unanimity on whether Mapes should be sentenced to death before it could consider any lesser sentence. Such instructions impermissibly interfere with jury deliberations by requiring that an affirmative step be taken before deliberation may move from one level to the next, and give a negotiating edge to jurors in favor of recommending the death penalty.

The court erred by giving a supplemental instruction which prohibited the jury from considering mitigating factors related to the New Jersey conviction.

We discuss each of these contentions in turn.

a.

Pertinent to the first claim--the "recommendation" issue--the Supreme Court has recognized that there is a danger in leading a death-sentence jury to believe that the ultimate responsibility for a death sentence lies with appellate courts. *See Caldwell v. Mississippi*, 472 U.S. 320, 332-33, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). In *Caldwell*, the prosecutor told a death-jury that a death sentence would really be determined by the state supreme court. *Id.* at 323, 105 S.Ct. 2633. This violated the defendant's rights under the Eighth Amendment to be protected from cruel and unusual punishment primarily because it allowed the jury to believe that it could make an incorrect determination without harming the defendant, and because appellate courts are ill-equipped to accurately review such aggravation-mitigation determinations. *Id.* at 330-32, 105 S.Ct. 2633.

However, in order to make out a *Caldwell* violation, a defendant must show that the prosecutor or trial judge improperly described the jury's role under state law in order to "water down" its responsibility. *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1101 (6th Cir.1990). In *Kordenbrock*, the prosecutor told the jury that a death-sentence verdict would merely be a recommendation to the trial judge. State law provided that

> "the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating or aggravating circumstances

... exist and to recommend a sentence for the defendant. Upon the findings of the jury, the judge shall fix a sentence within the limits prescribed by law."

Id. (quoting Ky.Rev.Stat. Ann. §532.025(1)(b)). This court found no constitutional violation because the prosecutor's characterization was "technically ... correct[ ]." *Id.*

In this case, Ohio law provides:

> Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury ... shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to [one of various terms of imprisonment]....
>
> If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall [weigh

> independently the aggravating and mitigating factors, and impose the death penalty if the former outweigh the latter, and impose a life sentence otherwise.]

Ohio Rev.Code Ann. §2929.03(D)(2), Vol. I (emphasis added); see *id.* at (D)(3).

Thus, while it is somewhat inaccurate to state that a sentencing jury "recommends" a life sentence when such a recommendation would be binding, we conclude that even if the trial judge's instruction was erroneous it could not have diminished the jury's sense of responsibility in *Caldwell* terms. The only plausible way that Mapes's jury could have been lulled into a diminished sense of responsibility is if it erroneously believed that a death verdict would only be a recommendation. However, this is an accurate statement of Ohio law. Further, one of the primary dangers identified in *Caldwell*--that the entity to which the jury ceded responsibility could not adequately exercise that responsibility--is absent here. In *Caldwell*, the state courts of appeals could not accurately assess the aggravating and mitigating factors presented in a sentencing hearing. In this case, it was the trial judge presiding over the hearing who reviewed the jury's determination. There was no constitutional error.

b.

As for the second issue, Mapes does not point to any instance in which the penalty-phase jury was instructed that a gun specification it found proved at the guilt phase had any bearing on the death-penalty recommendation. Moreover, the trial court did instruct the sentencing jury that the gun specification was irrelevant, and repeatedly stated that the only aggravating factor to be considered was the prior New Jersey killing. There was no error.

c.

Third, an instruction to a death-sentence jury that it may disregard the statutory criteria for imposing a death sentence may be constitutionally impermissible in light of the probability that such an instruction would result in arbitrary and unpredictable results. *See California v. Brown*, 479 U.S. 538, 541, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987). According to the Court, "sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses." *Id.* Thus, an instruction that the jury should not be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" was not only unobjectionable in Brown, it "serve[d] the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on [irrelevant,] extraneous emotional factors." *Id.* at 542, 543, 107 S.Ct. 837. Thus, there is no merit whatsoever to Mapes's claimed entitlement to a "merciful discretion" instruction, in light of the likely tendency of such an instruction to lead to arbitrary differences in whom is selected to be sentenced to death.

d.

As for the fourth issue, the trial court instructed the jury as follows:

> Now, as I have indicated, if all twelve jurors find by proof beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors, that is the aggravating circumstances which he was found guilty, Specification 4 in each count, then you must return a finding to the Court.
>
> I instruct you, as a matter of law, that if you make such finding then you have no choice and must

> recommend to the Court that the sentence of death be imposed on the defendant, David Mapes.
>
> . . . . .
>
> On the other hand, if after considering all of the relevant evidence raised at trial, the testimony, the other evidence, the unsworn statement of David Mapes, the evidence of the State of Ohio, and the arguments of counsel, you find that the State of Ohio failed to prove that the aggravating circumstances which the defendant, David Mapes, was found guilty of committing outweigh the mitigating factors, then you will return your verdict reflecting your decision. That is, you must unanimously find that the State has failed to prove beyond a reasonable doubt that the aggravating circumstances of which the defendant was found guilty of committing outweigh the mitigating factors. In this event you will then proceed to determine which of two possible imprisonment sentences to recommend to the Court.

(Emphasis added.) But the Ohio death-sentence statute contains no requirement that a capital jury must unanimously reject a death sentence before considering life imprisonment. See Ohio Rev.Code Ann. §2929.03(D)(2). A recommendation of death must be unanimous, but "[a]bsent such a [unanimous] finding, the jury shall recommend that the offender be sentenced to [some variety of life sentence.]" *Id.* Thus, under the statute, a jury that was not unanimous either way on a death sentence could consider a life sentence.

Moreover, the Ohio Supreme Court has ruled that an acquittal-first instruction, such as the one given by the trial court here, violates the Eighth and Fourteenth Amendments by creating a risk of an erroneous imposition of the death penalty.

See State v. Brooks, 75 Ohio St.3d 148, 661 N.E.2d 1030, 1041 (1996).

> The record reflects that the jury in this case was instructed in a manner completely contrary to law, making it less likely for Brooks to benefit from the opinion of one juror that the death penalty was inappropriate.... [I]f a juror believed his one vote could not affect the ultimate result, he might acquiesce in the death sentence. In this case, the jury instruction undermined the reliability of the jury verdict and risked erroneous imposition of the death sentence, thereby materially prejudicing Brooks's right to a fair trial.

661 N.E.2d at 1042. This error required vacating the death sentence and remanding for re-sentencing. *Id.* Although the trial court in this case did not have the benefit of *Brooks*, that case clearly establishes that the trial court misapplied Ohio Revised Code §2929.03(D)(2) by requiring the jury to unanimously reject the death penalty before considering a life sentence.

e.

The fifth alleged error occurred in response to a question from the deliberating sentencing jury. In answer to the jurors' question whether they were permitted to consider mitigating evidence with respect to Mapes's prior New Jersey murder conviction, the trial court stated, *inter alia*: "The mitigating factors do not apply to the prior murder conviction at all."

The United States Supreme Court has strongly suggested that all relevant mitigating factors must be considered by a death-sentence jury. For instance, in *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the trial court considered the youth of the offender in imposing the death sentence, but refused to consider the fact that the

defendant had been physically abused and that he was emotionally disturbed. *Id.* at 108-09, 102 S.Ct. 869. The Court held that the trial court violated the defendant's Eighth Amendment rights by refusing, as a matter of law, to evaluate all the evidence of mitigation. *Id.* at 113, 102 S.Ct. 869.

We find that the limitations placed by [the trial and appellate] courts upon the mitigating evidence they would consider violated the rule in *Lockett*. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Id. at 113-15, 102 S.Ct. 869 (some emphasis added) (footnote omitted).

Several times, the *Eddings* Court reiterated the relevant rule:

> "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

Id. at 110, 102 S.Ct. 869 (some emphasis added) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)). The *Eddings* Court also noted that the statute in *Gregg v. Georgia*, 428 U.S. 153, 197, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), was upheld because it directed the jury to

consider "any mitigating circumstances." *Id.* at 111, 102 S.Ct. 869. Stated differently, "the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender...." *Id.* at 112, 102 S.Ct. 869 (emphasis added) (internal quotation marks and citation omitted). Thus, the *Eddings* Court consistently indicated that any and all mitigating circumstances must be considered in reaching a death sentence. *Id.* at 111-15, 102 S.Ct. 869.

If, after *Eddings* and *Lockett*, there remained any question about the relevance of mitigating evidence pertaining to a prior crime it was resolved in *Sumner v. Shuman*, 483 U.S. 66, 81, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987). Nevada's death-penalty statute required the imposition of a death sentence whenever an inmate serving a life sentence killed someone in prison. The inmate in *Sumner* was not allowed to introduce any mitigating factors, and a death sentence was imposed. The Court found this unconstitutional because the sentencing authority must be permitted to consider any relevant mitigating evidence before imposing a death sentence. *Id.* at 76, 107 S.Ct. 2716. Most importantly, the Court explicitly stated that the circumstances regarding the crime for which the inmate was serving a life sentence were relevant. *Id.* at 80-81, 107 S.Ct. 2716.

> Even if the [life-sentence] offense was first-degree murder, whether the defendant was the primary force in that incident, or a nontriggerman like Shuman, may be relevant to both his criminal record and his character.

Id. at 81, 107 S.Ct. 2716.

In Mapes's case, after retiring to determine whether to recommend a death sentence, the jury submitted two questions to the judge. In open court, the judge responded:

Now, as to the first question, which reads as follows:

> "Are we [(the jury)] just to consider evidence presented to us in the sentencing hearing or testimony and evidence from both the trial and sentencing hearing as regarding the mitigating factors?"
>
> Of course, this is the fourth time I have explained this orally to you. If you find from all the evidence at the sentencing hearing and at the trial that the defendant has gone forward with some evidence of mitigation, and you find that the evidence exists as to the mitigation, then you are to consider it.
>
> The next question read:
>
> "Does [sic] the seven mitigating factors as it applies [sic] to [the prior- conviction death-penalty specification] cover this case and the prior conviction?"
>
> I have at least three times explained this to you. You are required to accept without reservation the fact that the defendant was convicted in 1972 of murder. And an essential element of which was the purposeful killing of another.
>
> The mitigating factors do not apply to the prior murder conviction at all. I might say that this is the aggravating circumstances that he was found guilty of when he waived the jury to me. And you are here to compare any mitigating circumstances that you find in this case with that aggravating circumstance.

(Emphasis added.) Defense counsel objected to this instruction.

After further deliberations, the jury again proffered two questions. The court responded, in relevant part:

> This means that the defendant, at this particular hearing has to produce evidence, some evidence of mitigating factors. If the defendant doesn't produce any evidence and the only evidence you have from the defendant is the statement of the defendant, and if you find mitigating factors, fine, and if you don't, you don't have any mitigating factors.

> In its third mid-deliberations communication to the court, the jury requested a copy of Mapes's unsworn statement, which was read a second time. The statement offered no mitigating factors except those that applied to the New Jersey murder. The jury then returned a recommendation of death.

We find that the Ohio trial court erred by effectively prohibiting the jury from considering any mitigating evidence concerning the prior murder conviction. Although the mitigating evidence relating to the New Jersey conviction was not as weighty as would have been evidence regarding Mapes's culpability for the Allen murder, Mapes's exculpatory evidence relating to his role in the New Jersey murder was nonetheless relevant to his overall moral culpability. Ohio's death-penalty statute clearly requires proof that the defendant committed at least one abhorrent act in addition to his conviction for aggravated murder. Although the U.S. Supreme Court has stated that all relevant mitigating factors must be considered, Mapes's jury was not allowed to consider the New Jersey mitigation evidence. The excerpt from the trial transcript we have quoted above demonstrates that the jury believed it could not consider the mitigating factors submitted by Mapes relevant to the New Jersey conviction, and finding no other mitigating factors in Mapes's statement,

believed it was required to recommend death, as defense counsel predicted when objecting to the court's charge.

But all that being so, the trial court's instructional errors do not require granting Mapes's habeas petition because neither of these last two instructional issues was raised on appeal. Thus, Mapes's procedural default is an adequate and independent ground for affirming his sentence. Only in the context of deciding whether Mapes's appellate counsel was unconstitutionally ineffective in failing, nevertheless, to raise these matters on direct appeal are these underlying errors relevant.

2. Guilty Verdict

The petitioner contends throughout his briefs on appeal that the jury's verdict of aggravated murder is logically inconsistent with its not-guilty verdicts on two death "specifications." That is, the jury convicted Mapes of aggravated murder, one element of which is the specific intent to kill, but acquitted him of two death-penalty specifications, one alleging that the murder took place during an aggravated robbery, and the other that the death occurred during an aggravated burglary. Under Ohio law "aggravated" burglary is defined as:

> (A) No person, by force, stealth, or deception, shall trespass in an occupied structure, ... with purpose to commit therein any theft offense, ... or any felony, when any of the following apply:
>
> . . . . .
>
> (2) The offender has a deadly weapon ... on or about his person or under his control[.]

Ohio Rev.Code Ann. §2911.11. Aggravated robbery is a robbery, that is, committing a theft offense, if the person has "a deadly weapon ... on or about his person or under his control."

Mapes further maintains that being acquitted on a principal-offender specification means that the jury found he was not the "triggerman" in the Chap's shooting, and that being acquitted of the other specification means he did not have the specific intent to kill. Mapes further maintains that the verdicts are findings of constitutional fact, and thus the state courts' recitation of the facts, implying or stating that Mapes was the triggerman and did have the specific intent to kill Allen, is erroneous.

In other words, if Mapes neither shot Allen nor was complicit in a plan to shoot him, then he lacked, as a matter of constitutional law, the requisite culpability necessary under the Eighth Amendment to justify the death penalty. Additionally, Mapes would have lacked the requisite intent under the Ohio aggravated-murder statute which unambiguously requires, in a felony-murder situation, that a defendant who participated in the felony also have intended to cause the death of another. Therefore, his argument continues, if the state-court judgment is allowed to stand, he will have been convicted of aggravated murder although the jury found one of the essential elements lacking. According to Mapes, this violates his right to due process: his procedural right to know in advance the elements of a crime he is charged with, and his substantive right to fundamental fairness.

United States v. Powell, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984), requires us to reject Mapes's contentions. In *Powell*, the defendant's phone had been legally tapped, and she was recorded helping her son and husband distribute narcotics and collect money for drugs sold. When she was arrested, she had two kilograms of cocaine and 2700

methaqualone tablets, among other things, in her car. *See id.* at 59, 105 S.Ct. 471. A jury convicted her of using the telephone in conspiring to possess with intent to distribute cocaine. However, the same jury acquitted her of conspiring to possess with intent to distribute cocaine. *See id.* at 59-60, 105 S.Ct. 471. The defendant appealed from the convictions, claiming that the acquitted count constituted an element of the telephone-facilitation count of which she was convicted, and that therefore the verdicts were inconsistent. The Ninth Circuit agreed, finding that the acquittal on the predicate felony demonstrated that insufficient evidence existed as to the telephone- facilitation charge. *Id.* at 61, 105 S.Ct. 471.

The Supreme Court rejected this analysis,-reasoning that " '[t]he most that can be said [about an inconsistent verdict] is that the verdict shows that either in the acquittal or the conviction the jury did not speak their [sic] real conclusions, but that does not show that they were not convinced of the defendant's guilt.' " *Id.* at 64-65, 105 S.Ct. 471 (citation omitted). Significantly, the Court repudiated the argument that the portion of an inconsistent verdict favorable to the defendant must be accepted and the portion favorable to the government discarded. See *id.* at 65, 105 S.Ct. 471. To the contrary, it is possible "that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense." *Id.* Although " 'error,' in the sense that the jury has not followed the court's instructions, most certainly has occurred," nothing in the Constitution requires that this "error" subject the jury's collective judgment to review and reversal. *Id.* at 65-66, 105 S.Ct. 471.

> [O]nce the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment. Courts have always resisted inquiring into a jury's thought processes ...;

> through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality.

Id. at 67, 105 S.Ct. 471 (citations omitted).

Even if Mapes's convictions on the aggravated-murder charges and the acquittals on the specifications are truly inconsistent--a conclusion that does not necessarily follow--this does not mean that Mapes lacked the specific intent to kill Allen. All the verdicts demonstrate is that the jury found Mapes guilty of aggravated murder, including the element that he possessed the intent to kill, and that it found him not guilty of two specifications which would have supported the death penalty under Ohio law. The aggravated-murder conviction does not require guilty verdicts on the specifications, and therefore cannot be set aside. Similarly, the state could not have sought the death penalty under Ohio law based only on the finding implicit in the aggravated-murder conviction that Mapes intended to kill Allen. *Powell* teaches that the inconsistent verdicts are viewed completely separately, and that no conclusion may be drawn from comparing the two. Ohio is within constitutional limits in finding Mapes guilty of aggravated murder and in imposing the death penalty because the jury found he had the requisite intent on the substantive charge.

3. Judicial Bias and Misconduct

In the course of his state-court appeal from the denial of post- conviction relief, Mapes claimed for the first time that the trial judge was biased, and that the facts to establish such bias existed outside the record and were not available upon direct appeal. Primarily, Mapes relied on affidavits provided by a juror, June Chatman, and her husband. When contacted by Mapes's present counsel in 1991--recall that the trial occurred in 1983-- juror Chatman and her husband attested

that the trial judge called Mr. Chatman on the telephone during the trial, saying that he didn't understand why Mrs. Chatman "wouldn't go along with the group and why was she holding out on convicting Mr. Mapes" given that "everybody else was agreeing." Further, the affidavits allege that during the trial, the court attempted to intimidate Mrs. Chatman by refusing her requests to seek medical treatment. Mrs. Chatman maintains that she was pressured by the court into voting for both the conviction and the death sentence.

The original trial judge initially reviewed this post-conviction allegation, and denied Mapes an evidentiary hearing, ruling that the allegation was barred by res judicata because it could have been raised on direct appeal. On the next level of post-conviction appeal, the court of appeals also denied Mapes an evidentiary hearing, even though he had alleged that the trial judge had contacted a juror and that the evidence substantiating this claim was necessarily outside the trial record. The court of appeals stated, correctly we think, that Mapes "ha[d] not provided this court with any facts that would suggest bias." In fact, in our own review of the 28 exhibits covering 280 pages to which Mapes points as evidence of the trial court's improper conduct, we find nothing--other than the Chatman affidavits--to indicate that the trial judge did anything improper or was in any way biased.

As for the Chatman issue, Mapes contends that there was no proper means by which the trial judge could have obtained the information regarding Mrs. Chatman's hold-out status, and that perforce the judge's actions show his bias and misconduct. Assuming the Chatman affidavits are truthful, we agree with this assessment. Nevertheless, we find that Mapes's procedural default in failing to raise this issue on direct appeal is an adequate and independent ground for dismissing this assignment of error.

Review of a habeas petitioner's constitutional claims may be barred if the denial of those claims by the state court is supported by an adequate and independent state ground. See *Wainwright*, 433 U.S. at 86-87, 97 S.Ct. 2497. However, the fact that a petitioner has not complied with a state procedural rule cannot bar federal review of constitutional claims if the state rule is not " 'firmly established and regularly followed.' " *Jones v. Toombs*, 125 F.3d 945, 946-47 (6th Cir.) (citation omitted), *cert. denied*, 521 U.S. 1108, 117 S.Ct. 2490, 138 L.Ed.2d 997 (1997).

The cases that Mapes claims demonstrate Ohio's wavering commitment to its procedural default rules do not in fact do so. Although he is correct that, in some cases, Ohio courts have forgiven some procedural defaults and considered the merits, in most of these cases the procedural default is the failure to contemporaneously object at trial. None of the cases cited by Mapes involves a post-conviction appeal in which an Ohio court overlooks the doctrine established by *State v. Perry*, 10 Ohio St.2d 175, 226 N.E.2d 104, syllabus (Ohio 1967). In *Perry*, the Ohio Supreme Court held that all assignments of error that were or could have been raised on direct appeal may not be considered collaterally in a post-conviction proceeding. *See id.* The only exception to that rule occurs when ineffective assistance of counsel is alleged and the petitioner had the same counsel during trial and on direct appeal. Even in its broadest form, this exception encompasses only those claims for which evidence is not contained in the trial record. See *State v. Cole*, 2 Ohio St.3d 112, 443 N.E.2d 169, 171 (1982).

Even if we assume that Ohio would extend this exception to allegations of trial court bias or misconduct, evidence of which is outside the record, Mapes forfeited his right to pursue this avenue by failing to adduce any such evidence in his initial post-conviction proceeding. He made the allegation at least as early as 1989 that Mrs. Chatman had been pressured,

but provided no support for it until 1991. Thus, he had knowledge of the essential facts, but failed to obtain the necessary affidavits to prove them in Ohio proceedings. And he has failed to demonstrate that anything prevented him from obtaining these affidavits before 1991--that is, in time to present them to Ohio courts on direct or post-conviction review. For the same reasons, Mapes is not entitled to an evidentiary hearing in federal court on this issue.

4. Unanimity of Sentencing Jury

Mapes also claims that the jury that sentenced him to death was not unanimous as required by Ohio law. He argues that when the trial judge polled the jurors, juror Chatman equivocated as to whether the guilty verdict was her verdict, and hinted at coercion. Before setting forth verbatim the trial court's exchange with juror Chatman, we shall examine Ohio case precedent on the subject.

When a juror indicates reservations about a verdict, or there is a potential lack of unanimity, Ohio law appears to require further inquiry on the part of the trial judge. In *State v. Brown*, 110 Ohio App. 57, 168 N.E.2d 419 (Ohio Ct. App. 1953), for instance, a juror responded, when polled: "May I tell the truth? ... I went with the rest because I was the only one left." *Id.* at 420. Shortly thereafter, the following occurred:

> [Defense Counsel]: Your Honor, I move to permit her to tell what happened.
>
> The Court: No. No, not entitled to tell what happened. No. She hasn't any right to tell what happened.
>
> [Defense Counsel]: If it isn't her verdict, do you want her to so state?

The Court: I want her to state.

[The juror]: Yes, but I have told you--

The Court: All right. It is. It either is or isn't.

. . . . .

[Defense Counsel]: Just a moment, Your Honor, I move that said juror number two be permitted to state to you just what she was going to state, that is, that she voted "yes" for guilt, but it is not her verdict. That is what she wants to tell. I think she should be permitted to let the record show that. This is a serious--

The Court: I do not expect to ask the juror that. I do not think I have any right to.

[Defense Counsel]: Will you let her tell?

The Court: No.

. . . . .

The court will accept your verdict. The jury is discharged.

Id. at 420-21. After noting that, in Ohio, unanimity is required in a criminal trial, the Ohio Court of Appeals reversed the judgment of conviction because there was no unequivocal assent by the juror to the verdict. *Id.* at 422. Although the trial court was correct to prohibit the juror from trying to explain her verdict, the court had a duty to ensure that the verdict was truly unanimous. Because a juror may change his mind between the jury room and the court room, a trial court

must either interrogate a juror who equivocates about his answer, or direct the jury to retire for further deliberation.

In a later case, the Ohio Court of Appeals held that a juror's ambiguous statements did not require reversal of the conviction. See *State v. Fields*, 16 Ohio Op. 2d 290, 176 N.E.2d 845, 849-50 (Ohio Ct. App. 1960). Although the precise dialogue is not provided in the court's opinion, it appears that one juror cast some doubt about her verdict by saying that, while she agreed to have the foreman sign the verdict form, she was reluctant to give her consent. However, when the jury was polled a second time, she stated definitely that it was her verdict. She was given "full opportunity" to say whether it was or was not her verdict, and ultimately and unambiguously chose the former. Thus, no error occurred. *Id.*

In finding no error in the jury verdict in Mapes's case, the federal magistrate judge relied on *Emmert v. State*, 127 Ohio St. 235, 187 N.E. 862 (Ohio 1933). In that case, after ten of the jurors had claimed the guilty verdict as theirs, the final two jurors equivocated.

> By the Court (to Juror Miller): Q. Mrs. Miller, is this verdict which has been returned in open court your verdict? A. Well, I didn't want to sign it that way.
>
> Q. What is that? A. I didn't want to sign it that way.
>
> Q. Is it your verdict? A. I signed it; Yes, sir.
>
> Q. It is? A. I signed it.
>
> Q. What is that? A. I signed the verdict.
>
> Q. And it is your verdict? A. Well, I suppose if I signed it it would be.

> Q. I want to know if that is your verdict now. You ought to know if it is or not; is that your verdict? A. Well, I don't know. * * *
>
> Q. Is it not your verdict? A. In my heart I don't feel entirely satisfied with it.
>
> Q. You say that it is not your verdict? A. Well, I suppose you could call it that.
>
> Q. What is that? A. I suppose you could call it that.
>
> By the Court: Q. How about you Mrs. Leiter? A. Mine was because the majority rules is all.
>
> Q. I don't want to know the majority rule, I want to know whether that is your verdict? A. It is my signature and my verdict; yes. (Thereupon counsel confer with court at bench.)
>
> By the Court: Q. Mrs. Miller, we are a little confused as to your attitude. I should like to ask you this question in a larger form, but I am compelled to ask you in the language of the statute. Is or is not this verdict your verdict? A. Yes; it is.

187 N.E. at 863 (emphasis added). The state supreme court held that the trial court had not erred, noting that both jurors were given ample opportunity to disclaim the verdict, but instead had ultimately affirmed the guilty finding. *Id.*

In Mapes's case, the trial court asked each juror, "Is this your verdict?" Every juror responded affirmatively, except for June Chatman. The transcript of the jury poll reveals the following:

[THE COURT:] ... The question I am going to ask you is, is this your verdict, and if it is you say, yes.

. . . . .

THE COURT: June Chatman. June Chatman.

MRS. CHATMAN: This is the verdict?

THE COURT: The one that we just read.

MRS. CHATMAN: Yes.

Defense counsel then asked for a repoll, which the court granted. This time, when the other jurors again repeated their original responses, Mrs. Chatman hesitated:

THE COURT: June Chatman.

MRS. CHATMAN: I have to say yes or no?

THE COURT: Yes, you have to say yes or no. It is yes or no. Did you sign these?

MRS. CHATMAN: I signed them, yes.

[DEFENSE COUNSEL]: Objection, your Honor. Could we ask whether or not these were her verdicts?

THE COURT: Are these your verdicts, Mrs. Chatman?

MRS. CHATMAN: It's to me, it's the State's verdict.

THE COURT: Wait a second. Please be seated, [defense counsel]. Did you sign this verdict?

MRS. CHATMAN: Yes, I did.

THE COURT: Okay. Londell Smith, please.

[DEFENSE COUNSEL]: Objection, your Honor. It is not whether she signed it, is it her verdict?

THE COURT: Please be seated. It is sufficient for this Court. Londell Smith, please.

MR. SMITH: Yes.

Almost certainly, Mapes's trial court erred in accepting Mrs. Chatman's verdict. Although Mrs. Chatman seemed to assent to the verdict the first time she was polled, clearly she did not do so the second time. As the Ohio cases discussed above demonstrate, a juror may indicate her assent to a guilty verdict, but when the assent is conditional or hints at coercion, the trial judge is obligated to inquire further. Mrs. Chatman admitted to signing the verdict forms; however, this is insufficient under *Brown*. A juror may change her mind at any time before the verdict is entered, and that is what may have happened here. Mrs. Chatman's assent, if given at all, was not unequivocal. At the very least, the trial court was required to confirm with Mrs. Chatman that the guilty verdict was hers, or to send the jury back to deliberate further.

Emmert does not save the error, but rather seems to confirm it. In that case, the jurors equivocated, and the trial court properly inquired further. Although the preferred resolution probably would have been to send the jurors back to deliberate further, the court avoided the worst resolution, which was to enter the guilty verdict based on the verdict form alone. After questioning by the trial court, which the Ohio Supreme Court noted was not coercive, both *Emmert* jurors unambiguously assented to the verdict.

Here, Mrs. Chatman equivocated, she was not questioned further, and her verdict was accepted based on the fact that she had signed the form.

As with the other trial errors we have discussed above, however, this assignment of error has been forfeited unless appellate counsel was unconstitutionally ineffective in failing to raise it--a matter we shall address in due course.

5. Exclusion of Evidence Regarding Mapes's Prior Conviction

In this assignment of error, Mapes maintains that the trial court erred in ruling that it could not look behind the judgment of conviction on Mapes's New Jersey *non vult* murder plea, and that the error violated Mapes's right to due process and his right to be free from cruel and unusual punishment. According to Mapes, New Jersey law allows such judgments to be collaterally attacked when two criteria are met: (1) the plea was entered in order to avoid a possible death sentence, and (2) the record demonstrates a realistic possibility that the defendant did not commit murder. Mapes contends that his plea was entered to avoid the death penalty--even though New Jersey's death-penalty statute had been ruled unconstitutional by the New Jersey Supreme Court--because the U.S. Supreme Court had not yet ruled on a petition for certiorari, and could have reinstated a death sentence, had one been imposed.

Mapes further contends that several factors demonstrate he lacked the culpability to be convicted of the New Jersey murder. First, the New Jersey sentence was consistent with a conviction for manslaughter. Second, Mapes's explanation for his involvement in the New Jersey murder demonstrates at worst that he committed manslaughter. Third, Mapes has produced sufficient evidence of his contentions, including the New Jersey police report and the statements of others involved in the crime.

In Ohio, to be eligible for the death penalty a defendant must be found guilty of aggravated murder and at least one death specification. See Ohio Rev.Code Ann. §2929.04(A). Thus, a defendant who "[p]rior to the offense at bar ... was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another ...." may be sentenced to death if both judge and jury find that the death-specification circumstance outweighs any mitigating circumstance. §2929.04(A)(5).

Quite simply, it is irrelevant, for purposes of Ohio Revised Code Ann. §2929.04(A)(5), whether Mapes, in fact, killed someone in New Jersey. The specification does not apply to those who have previously killed others, but to those who have been convicted of a prior killing. There is no dispute that this condition was satisfied. The court properly excluded Mapes's proffered evidence on this issue because it is irrelevant.

B. Effectiveness of Trial Counsel

Mapes identifies four errors allegedly committed by his trial counsel: (1) failing to conduct any investigation into mitigation factors; (2) failing to object to the trial judge's misleading jury instructions and the trial judge's erroneous response to the sentencing jury's questions; (3) having no trial strategy other than being rude and abusive; and (4) failing to request a lesser-included-offense instruction.

In order to establish a Sixth Amendment violation, it must be shown both that counsel's representation fell below an objective standard of reasonableness, and his deficiencies prejudiced the defendant. *See Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In considering the second, "prejudice" prong of its test, the *Strickland* Court noted that even professionally unreasonable errors "do [ ] not warrant setting aside the judgment of a

criminal proceeding if the error[s] had no effect on the judgment." *Id.* at 691, 104 S.Ct. 2052. But *see United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Except in certain limited circumstances, "ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052. The Court explained, that to do so,

> it is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding....
>
> On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case....
>
> . . . . . .
>
> ... The appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 693-94, 104 S.Ct. 2052 (citations omitted).

The issues regarding counsel's performance during the guilt phase of Mapes's trial may be dismissed on the basis that the evidence of Mapes's guilt was overwhelming. That is, even assuming that trial counsel was not reasonably effective, Mapes can establish no prejudice. There is almost no chance that the verdict would have been different but for counsel's allegedly defective performance. Mapes admitted to taking part in the robbery, he was identified by eyewitnesses as the person who shot Allen, and corroborating evidence was admitted indicating he was the shooter. In light of this, there is no reasonable probability that different actions or a different strategy by counsel could have avoided a guilty verdict.

Mapes also fails to show any prejudice arising from counsel's alleged failure to obtain mitigation evidence besides that relating to the New Jersey killing. Mapes claims that counsel did no investigation in this regard, but the sworn statements he has produced as support for this contention merely show that certain persons were not contacted. Mapes does not indicate why these persons should have been contacted, or what mitigating evidence they would have supplied if they had been. He does not show that there was any mitigating evidence overlooked by trial counsel, let alone whether the discovery of such evidence would probably have inclined the jury to eschew a death-sentence recommendation.

On the other hand, the issue regarding the development of the New Jersey evidence is close. Under the Ohio statute, a capital defendant found guilty of a death specification has to present some mitigating evidence in order to avoid the death penalty. If a jury has nothing to weigh against the aggravating circumstance, it almost certainly must find that the aggravating circumstance outweighs the (nonexistent) mitigating circumstances, and recommend death.

The only evidence actually presented by trial counsel that could have saved Mapes from a death sentence was Mapes's

unsworn statement that he was not the triggerman in New Jersey. However, it appears that other evidence was available to corroborate Mapes's unsworn contention. That is, the record suggests that a man named Elliott Hampton was the triggerman in New Jersey. For instance, Hampton himself states that he is serving a life sentence after being convicted as the triggerman in that crime. And, another New Jersey accomplice states that Hampton, not Mapes, shot the New Jersey victim. Mapes's Ohio accomplice, Rodney Newton, has recanted his trial testimony that Mapes admitted being the New Jersey triggerman. Finally, although it is not in the record, the New Jersey police report purportedly concludes that Hampton, not Mapes, was the shooter. In his habeas petition, Mapes has provided the affidavits of three Ohio Public Defender Commission investigators who have sworn that they reviewed the police report and that it indicates Hampton was the triggerman.

Certainly, trial counsel must commit a serious error to be judged unconstitutionally ineffective. However, when a client faces the prospect of being put to death unless counsel obtains and presents something in mitigation, minimal standards require some investigation. The record indicates no such efforts by Mapes's counsel. And, even the little mitigation presented--Mapes's unsworn statement--could have been significantly corroborated by the evidence later gathered by Mapes's present counsel. There is no reason to believe this evidence was not available to trial counsel. Admittedly, whether Mapes was or was not the triggerman in the New Jersey killing is slim evidence of mitigation, but it is something. And what is most important, it was Mapes's only shield from a death sentence. Moreover, the New Jersey murder conviction was what made Mapes eligible for the death penalty in the first place. Therefore, the evidence that he was not the shooter was certainly relevant as to his overall culpability. One is left with the strong impression that trial counsel, after hearing the guilty verdict with the death

specifications, merely threw up his hands and conceded that his client would be put to death.

As we concluded above, the jury was wrongly precluded from even considering Mapes's unsworn statement concerning the New Jersey homicide as mitigating whether he deserved execution; it was erroneously required to reach unanimity on the death recommendation before considering a life sentence; and there is a good possibility that the sentencing jury was not, in fact, unanimous. Thus, when these errors are considered together with trial counsel's failure to investigate any mitigating factors, prejudice is almost self-evident.

To reiterate, however, this error too has been forfeited by Mapes's failure to raise it on appeal. It is relevant only insofar as it bears on the question whether appellate counsel was unconstitutionally ineffective in failing to raise it, an issue we turn to now.

C. Effectiveness of Appellate Counsel

Mapes contends that his appellate counsel was unconstitutionally ineffective because he failed to raise the following arguments on appeal: (1) trial counsel was ineffective; (2) the jury was erroneously instructed that its death sentence would only be a recommendation; (3) the jury was erroneously instructed that it had to unanimously reject a death sentence before it could consider a term of years; (4) the jury was not, in fact, unanimous on its death verdict; and (5) the sentencing jury was wrongly precluded from considering relevant mitigating evidence. Additionally, sixth, Mapes contends that his appellate attorney did not competently argue the constitutional issue regarding whether Mapes could be sentenced to death absent a finding that he intended to kill Allen.

We are satisfied that Mapes's counsel's failure to raise issues (2) and (6) above--(2) whether the jury's role was merely to "recommend" the death sentence, and (6) whether the jury found that Mapes intended to kill John Allen--was not unconstitutionally ineffective representation. As to the former, the jury's death sentence verdict was merely a recommendation. As to the latter, the jury did find that Mapes intended to kill Allen. The specific intent inherent in the aggravated-murder charge is supported by sufficient evidence, and the allegedly inconsistent verdicts on the specifications are irrelevant on this point. The finding of Mapes's specific intent to kill supports the murder conviction and brings the imposition of the death penalty within constitutional limits. Counsel could not be unconstitutionally ineffective for failing to raise these meritless arguments.

However, appellate counsel's failure to raise the trial errors surrounding the death sentence, most of which were objected to by trial counsel, is almost inexplicable. To summarize: (1) trial counsel apparently did no mitigation investigation, and presented no mitigation defense save an unsworn and uncorroborated statement by Mapes that he was not the New Jersey triggerman, even though corroborating evidence almost certainly existed; (2) over trial counsel's objection, the trial judge erroneously prohibited the sentencing jury from considering Mapes's only mitigating evidence, effectively requiring the jury to recommend death; (3) the trial judge erroneously required the jury to reject the death penalty unanimously before considering a life sentence; and (4) over trial counsel's objection, the court accepted a death recommendation from the jury despite one juror's obvious hesitation.

The cases decided by this court on the issue of ineffective assistance of appellate counsel suggest the following considerations that ought to be taken into account in

determining whether an attorney on direct appeal performed reasonably competently.

(1) Were the omitted issues "significant and obvious"?

(2) Was there arguably contrary authority on the omitted issues?

(3) Were the omitted issues clearly stronger than those presented?

(4) Were the omitted issues objected to at trial?

(5) Were the trial court's rulings subject to deference on appeal?

(6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?

(7) What was appellate counsel's level of experience and expertise?

(8) Did the petitioner and appellate counsel meet and go over possible issues?

(9) Is there evidence that counsel reviewed all the facts?

(10) Were the omitted issues dealt with in other assignments of error?

(11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

See Moawad v. Anderson, 143 F.3d 942, 948 (5th Cir.), *cert. denied*, 119 S.Ct. 383, 142 L.Ed.2d 316 (1998); *Bethea v. Artuz*, 126 F.3d 124, 126 (2d Cir.1997), *cert. denied*, 118 S.Ct. 1092, 140 L.Ed.2d 148 (1998); *Mason v. Hanks*, 97 F.3d 887, 893-94 (7th Cir.1996); *Sistrunk v. Vaughn*, 96 F.3d 666, 670-71 (3d Cir.1996); *Parker v. Bowersox*, 94 F.3d 458, 462 (8th Cir.1996), *cert. denied*, 520 U.S. 1171, 117 S.Ct. 1439, 137 L.Ed.2d 545 (1997); *McBride v. Sharpe*, 25 F.3d 962, 973 (11th Cir.1994); and *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir.1994).

Manifestly, this list is not exhaustive, and neither must it produce a correct "score"; we offer these inquiries merely as matters to be considered.

Applying them to Mapes's case, it appears that most of the factors fall in Mapes's favor. First, the issues omitted were significant and probably obvious. Although some of the cases cited were published after the appellate brief was submitted, nevertheless, by 1984: (1) Ohio's death-penalty statute did not require unanimous rejection of a death sentence before a jury could consider a life sentence, and in fact implied the opposite; (2) the Supreme Court had indicated that all relevant mitigating evidence, including evidence relating to a defendant's prior criminal record, must be considered by a sentencing jury; (3) *State v. Brown*, *State v. Fields*, and *Emmert v. State* all indicated that a trial judge must inquire further of an equivocating polled juror or send the jury back for further deliberations; and (4) the Sixth Amendment required that a defendant receive reasonably effective counsel at all stages of the proceedings. These errors should have been obvious in 1984; moreover, there appears to be no authority that would have tempered counsel's enthusiasm for bringing them, satisfying the second criterion.

Third, these issues were clearly stronger than some of those presented. Appellate counsel brought 12 assignments of

error, indicating that winnowing of issues was not a primary consideration. And all but one of these assignments pertained to the guilt phase, despite the overwhelming evidence of Mapes's guilt. In fact, the Ohio Court of Appeals expressly relied on the strength of the evidence in finding some errors harmless. Moreover, as the Ohio Court of Appeals' opinion demonstrates, several of the assignments were almost entirely meritless.

Fourth, the lack-of-unanimity and prohibition-of-mitigating-evidence issues were objected to at the sentencing phase. Concededly, it is unclear whether trial counsel objected to the court's erroneous instruction that the jury must unanimously reject the death penalty before considering a life sentence. But trial counsel's other objections should have prompted appellate counsel to investigate and raise those issues. Fifth, many of these omitted issues would have been subject to de novo review upon appeal. Thus, appellate counsel cannot have strategically reasoned that a court of appeals would defer to the trial court's rulings.

Sixth, appellate counsel has never been asked to defend his decisions, thus we can only guess what his reasons were for having failed to raise these issues. Similarly, we can only speculate whether he in fact read all the sentencing transcript. Seventh, the record does not reflect the level of appellate counsel's experience and expertise. Eighth, there is no evidence that Mapes and his appellate counsel met and discussed possible issues; nor is there evidence, ninth, that counsel knew all the relevant facts. Although we have not been provided Mapes's direct-appeal briefs, we note that the court of appeals did not mention in its opinion any of the facts pertinent to the omitted issues. This indicates that appellate counsel may not have discussed these facts either. Tenth, the omitted issues were not dealt with in other assignments of error.

Finally, eleventh, there seems to be no reasonable justification for omitting these issues. We find entirely plausible Mapes's contention that his appellate counsel did not read the entire sentencing transcript, as the attorney appears to have addressed every other conceivable nonsentencing argument in his brief. Interestingly, the Eleventh Circuit has held it unreasonable as a matter of law to fail to review a sentencing transcript where trial counsel made colorable objections. See *Joiner v. United States*, 103 F.3d 961, 963 (11th Cir.), *cert. denied*, 520 U.S. 1246, 117 S.Ct. 1857, 137 L.Ed.2d 1058 (1997).

Importantly, Mapes has not forfeited his right to a hearing on this issue, because he properly raised it on post-conviction review and Ohio courts erroneously refused to consider it. As we have noted, the trial court declined to conduct postconviction review because it believed it could not pass on the validity of the court of appeals' direct-review decision. If the trial court had found ineffective assistance of appellate counsel, it would have had to vacate the appellate judgment, a result which the court felt was beyond its authority. Inexplicably, the court of appeals rejected the ineffective assistance of appellate counsel argument because the trial court was correct in its opinion that it did not have the power to review the claim. It was thus that the erroneous circular reasoning was concluded. The Ohio Supreme Court did not discuss any of the merits upon post-conviction review. Consequently, Ohio's procedural ground for denying review of this claim is not "adequate" and cannot obviate the need for review of the constitutional merits. In light of the strong possibility that Mapes's Sixth Amendment rights in this regard were violated, he is entitled to have his ineffective-assistance-of-counsel argument heard in the federal district court.

Of course, even if counsel is found to have been ineffective, prejudice must still be shown. However, considering that all four errors concern the sentencing phase

and that juror Chatman almost certainly did not favor a death recommendation, we think there is a "reasonable probability that, absent the errors, the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *See Strickland*, 466 U.S. at 695, 104 S.Ct. 2052.

IV.

We conclude that Mapes may not have received, on direct appeal, the assistance of counsel which the Sixth Amendment guarantees. Thus, we REVERSE, IN PART, and REMAND this case for an evidentiary hearing so that the district court may evaluate appellate counsel's performance in light of the factors we have discussed. The district court's judgment denying the petitioner's claims in all other respects is hereby AFFIRMED.

SILER, Circuit Judge, concurring in part and dissenting in part.

I concur in the majority opinion on all issues except that pertaining to the effectiveness of appellate counsel. I also concur with the conclusion by the majority that Mapes has sufficiently raised the question of ineffective assistance of appellate counsel by the failure to raise on appeal the trial court's instruction that in the sentencing phase, "the mitigating factors do not apply to the prior murder conviction at all." That issue appears to have had validity at the time of the trial. *See Eddings v. Oklahoma*, 455 U.S. 104, 113-114, 102 S.Ct. 869, 71 L.Ed.2d 1 (1981). Agreeing with the majority, I would remand that issue for an evidentiary hearing, so that appellate counsel, if he can recall, may explain why he failed to raise that issue on appeal. He may have had strategic reasons for omitting the issue, or his client may have requested that it be omitted. Because no court has yet heard testimony

from appellate counsel on that question, it is appropriate for the district court to decide whether appellate counsel's performance met the test under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

However, I depart from the decision by the majority to remand this matter to the district court for consideration of ineffective assistance of appellate counsel for failing to raise the other issues, to-wit, (1) ineffective assistance of trial counsel; (2) other jury instructions requiring the jury to reject the death penalty unanimously before considering a life sentence; and (3) the hesitation of Juror Chatman to reply in a more positive matter at the time of the jury poll.

The general principles of ineffective assistance of counsel bear repeating, to some degree. First, there is a strong presumption that counsel was constitutionally effective. *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. Second, counsel decides which issues to pursue on appeal and there is no duty to raise every possible claim. *See Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). The "process of 'winnowing out weaker arguments on appeal and focusing on' those most likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (quoting *Jones v. Barnes*, 463 U.S. at 751-52, 103 S.Ct. 3308). Finally, "[e]ffective advocacy does not require the appellate attorney to raise every non-frivolous issue under the sun, of course." *Mason v. Hanks*, 97 F.3d 887, 893 (7th Cir.1996) (citing *Jones v. Barnes*, 463 U.S 745, 103 S.Ct. 3308). These principles require that the court find that a particular omission of counsel both was not only ineffective but that the omission prejudiced the defendant, thus rendering the proceeding fundamentally unfair and the result unreliable. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. This is why the district court must hold a hearing, to give the petitioner an opportunity to call his

appellate counsel and allow him to explain the omission of the issue discussed herein. *See Sistrunk v. Vaughn*, 96 F.3d 666, 671 (3d Cir.1996).

On the other issues concerning the ineffective assistance of appellate counsel, I would uphold the decision of the district court. The majority has raised the issue of the ineffective assistance of counsel on appeal because he did not raise the question of ineffective trial counsel for their failure to conduct a mitigation investigation and present a mitigation defense other than Mapes's statement. I agree with the district court's conclusion that Mapes has not shown that trial counsel was ineffective at the sentencing phase, so appellate counsel could not have been ineffective in failing to raise this issue on direct appeal. The affidavits of an attorney and a mitigation specialist do not show what mitigating evidence could have been produced that was not. In addition, although Mapes has presented some evidence that he was not the trigger man in the New Jersey homicide, this evidence was not discovered until 1987, and there is no proof that defense counsel could have discovered it at trial. As to the references to the New Jersey police report, the petitioner has not even yet produced copies of it. Finally, the trial court instructed the jury, anyway, that it was not to consider any mitigating factors pertaining to the New Jersey murder. Therefore, if the trial court's instruction effectively precluded the jury from considering any mitigation in connection with the New Jersey homicide, then such evidence could not have been introduced.

Next, I dissent from the conclusion of the majority that appellate counsel was ineffective for failing to raise the issue that the trial court's instructions were erroneous by requiring the jury to reject the death penalty unanimously before considering a life sentence. I agree with the district court that the instruction by the court was in accordance with the language from R.C. §2929.03(D)(2). Obviously, according to the majority opinion, *State v. Brooks*, 75 Ohio St.3d 148, 661

N.E.2d 1030, 1041 (1996), later indicated that similar language was erroneous. However, *Brooks* was decided many years after the trial of this case, and it cited for authority *Mills v. Maryland*, 486 U.S. 367, 376-377, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). Thus, at the time of the trial here, there was no authority that such an instruction was erroneous under Ohio law. It was even said in *Brooks*, 661 N.E.2d at 1042: "In Ohio, a solitary juror may prevent a death penalty recommendation by finding that the aggravating circumstances in the case do not outweigh the mitigating factors. Jurors from this point forward should be so instructed." Thus, it appears that Brooks was stating that the law which affected that particular case was to be considered prospectively only. Mapes in this case cites *State v. Thomas*, 40 Ohio St.3d 213, 533 N.E.2d 286 (1988), as authority that this instruction was erroneous, but Thomas, as analyzed by the district court, involved the guilt phase of a trial and involved a lesser-included offense, which is not the situation here. Thus, Thomas is not applicable to this case. It is not ineffective assistance of counsel when counsel fails to anticipate a change in the law. See *Sistrunk*, 96 F.3d at 671.

Finally, I also dissent from the conclusion of the majority that the district court should conduct a hearing on the failure of appellate counsel to inquire further into the poll of the jury. During the poll, Mrs. Chatman, the juror, said that she signed the verdict. In response to the court's question, "Are these your verdicts, Mrs. Chatman," she replied, "It's to me, it's the State's verdict." Although the court could have returned the jury to the jury room for further deliberation, receiving the verdict under the circumstance was not erroneous. I disagree with the majority that *State v. Fields*, 176 N.E.2d 845, 849-50 (Oh.Ct.App.1960); *State v. Brown*, 110 Ohio App. 57, 168 N.E.2d 419 (Oh.Ct.App.1953); and *Emmert v. State*, 127 Ohio St. 235, 187 N.E. 862 (1933), hold to the contrary. Although the issue is one which could have been raised on appeal, the failure to do so does not constitute ineffectiveness of counsel.

That issue was not a "dead-bang winner" as used by one of our sister circuits, in describing an issue that is obvious from the trial record (and one which would probably have resulted in a reversal on appeal). See *Banks v. Reynolds*, 54 F.3d 1508, 1515 n. 13 (10th Cir.1995). Appellate counsel did a commendable job on direct appeal in this case. He raised twelve issues. Although, in hindsight, we now criticize the brief for not raising other issues, the only question which arguably should have been raised is that pertaining to consideration of mitigation evidence surrounding the homicide in New Jersey. Even the failure to raise that issue may be excused after a hearing in the district court when appellate counsel has an opportunity to explain how he conducted the case. The difficulty in this case will be whether the attorney can even remember why he did certain things on appeal, for the direct appeal concluded in 1985. It would be very hard for any of us to explain our conduct which occurred some thirteen years ago.

APPENDIX C

Filed: 9/30/96

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID A. MAPES,	)	Case No. 1:91 CV 0056
	)	
Petitioner,	)	JUDGE SOLOMON OLIVER, JR.
	)	
ARTHUR TATE, WARDEN	)	
	)	
	)	
Respondent.	)	ORDER

This court has before it the February 24, 1994, Report and Recommendation of the Magistrate Judge regarding the habeas petition of David A. Mapes seeking relief from his conviction in the Cuyahoga County Common Pleas Court for aggravated murder and his resulting death sentence. The court has thoroughly reviewed the pertinent portions of the record, the Objections (Docket #57) and Supplemental Objections (Docket #59) of the Respondent, the Objections of the Petitioner (Docket #61), the Reply by Respondent to Petitioner's Objections (docket #66). This court has found that neither the Petitioner's Objections or those of the Respondent are well taken. The court hereby adopts the Report and Recommendation of the Magistrate Judge in its entirety.

The petition for a writ of habeas corpus concerning the conviction of Petitioner is denied. The petition for a writ of

habeas corpus regarding the death sentence is granted unless the state affords Petitioner Mapes an opportunity to present his appeal to the appropriate Ohio State court within 90 days, for its consideration on the merits, of the issue related to the ineffective assistance of Appellate counsel claim the court found meritorious as if it were properly and timely presented.

IT IS SO ORDERED.

_____

JUDGE SOLOMON OLIVER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

Filed: 2/24/94

UNITED STATES DISTRICT COURT
NOTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID A. MAPES,	)	1:91CV0056
	)	
Petitioner,	)	JUDGE FRANK J. BATTISTI
	)	(Magistrate Judge
ARTHUR TATE,	)	Jack B. Streepy)
WARDEN	)	REPORT AND RECOMMENDED
	)	DECISION OF MAGISTRATE
Respondent.	)	JUDGE

STREEPY, MAG. J.

Petitioner, David Mapes (Mapes), filed this habeas corpus petition seeking relief from his conviction of aggravated murder and the resulting death sentence in his trial in the Court of Common Pleas of Cuyahoga County, Ohio.

The jury trial was conducted in two distinct phases. The first phase, termed the "guilt phase," dealt with whether Mapes was guilty of aggravated murder and of any specification which would make him eligible for the death penalty. Since he was found guilty of aggravated murder and a death eligible specification (the trial judge found him guilty of the specification), the second phase, termed the "sentencing phase," was held. This phase dealt with the issue of whether Mapes should be sentenced to death.

For the reasons set forth below, it is concluded that the petition be denied on the finding of guilt, and conditionally

granted on the death sentence (by reason of ineffective assistance of appellate counsel).

The background facts are provided by the Supreme Court of Ohio in petitioner's direct appeal, *State v. Mapes*, 19 Ohio St.3d 108, 108-110 (1985); *cert. denied sub nom., Mapes v. Ohio*, 476 U.S. 1178 (1986);

> On January 30, 1983 at approximately 7:50 a.m., ... David Mapes, and Rodney Newton entered Chap's Bar located on Prospect Avenue in Cleveland, Ohio. The bar was closed, but one of its owners, John Allen, and four employees were present. Allen, Ronald Rucci and Michael Williams were seated at the bar. John Hovekamp and David Yun were off to the side in a section of the bar known as the "pit area," asleep. A sixth man, Frank Kuhn, was upstairs in the building.
>
> Mapes and Newton gained entrance through the rear of the building and, upon encountering the three men at the bar, Mapes aimed a sawed-off shotgun he was carrying at Rucci's head and instructed all three to put their hands on the bar. Allen began to make some gesture with his hands and Mapes shot him in the face. Allen fell to the floor, mortally wounded. At the sound of the shot, Rucci dove to the floor. Mapes ordered Williams to lie on the floor and then searched the men on the floor, including Allen, for money. Newton went first behind the bar to the cash register, and then proceeded to the video machines. While en route to the video machines, Newton spotted Yun and Hovekamp in the "pit area" and notified Mapes of their presence. Mapes ordered Rucci and Williams to crawl to the "pit area" and stood guard over the four there while Newton broke into the video games with a crowbar.

Mapes and Newton next proceeded to the back of the building where the safe was located and the liquor was stored. The two were not able to open the safe as Allen had been the only one present who knew the combination. The four men then heard a door slam and, after determining it was safe, called the police. Allen was dead when the police arrived at 8:10 a.m. The police found no one at the scene but found a broken window by the parking lot of the Town House Apartments and a garage door held open by a wooden block.

Michael Reese, upon hearing the news accounts of the murder and robbery, notified a Cleveland detective that Mapes had approached him and had attempted to recruit him for the robbery of Chap's Bar. Reese gave the police a formal written statement to this effect on February 5, 1983. On February 6, the police showed a photo array to John Hovekamp. He selected photos of three individuals whom he thought resembled the gunman. This group included a photo of [Mapes]. On the next day, a warrant for [Mapes'] arrest and a warrant to search his apartment were obtained. This search, conducted on February 8, 1983, revealed, among other things, a crowbar. [Mapes] was arrested and, when questioned, he told the police that he had merely prepared an entrance to the bar, but that Newton and a man named Red had committed the robbery. On February 11, 1983, a lineup was held at which Hovekamp positively identified [Mapes] as the man carrying the shotgun within the premises where the robbery and murder occurred.

Newton was arrested on March 4, 1983 in Akron and was interviewed by Cleveland police on March 7.

He gave a full written statement to police recounting the events at the bar consistent with the accounts of the bar employees and the police investigation. This written statement was introduced at trial and Newton testified at trial. Newton also indicated that [Mapes] had returned to his own apartment and dropped unused shells down a drainpipe and arranged to dispose of the gun. After obtaining a warrant, the police found a shell in the hole indicated by Newton. The shell was the same type that was used kill Allen.

Rucci positively identified [Mapes] during trial as the man who shot Allen with a sawed-off shotgun. Hayward Chambers testified at trial that [Mapes] had admitted to him that he had robbed Chaps and killed Allen. [Mapes'] wife and a neighbor, Christine Alexander, both testified that [Mapes] owned a sawed-off shotgun.

[Mapes] was indicted for two counts of aggravated murder under R.C. 2903.01(B). One count charged that the murder occurred during the course of an aggravated robbery. The other count charged that the murder occurred during the course of an aggravated burglary. Each of these counts had four identical specifications as follows: Under R.C. 2929.04(A)(7), one death-penalty specification alleging the offense occurred in the course of an aggravated robbery; under R.C. 2929.04(A)(7), one death-penalty specification alleging the offense occurred in the course of an aggravated burglary; under R.C. 2929.04(A)(5), one death-penalty specification alleging a prior murder conviction; and, under R.C. 2941.141, one firearm specification. In addition to the death-penalty charges, Counts Three, Four, and Five each charged aggravated robbery

under R.C. 2911.01, and Count Six charged aggravated burglary under R.C. 2911.11.

The jury returned a verdict finding [Mapes] guilty of both counts of aggravated murder under R.C. 2903.01(B), but not guilty of the death-penalty specifications charged under R.C. 2929.04(A)(7). [Mapes] was found guilty of the firearm specification as well as Counts Four, Five, and Six. [Mapes] was found not guilty of Count Three.

The issue of whether [Mapes] was guilty of the prior murder specification under R.C. 2929.04(A)(5) was tried separately to the court. The court received into evidence an indictment from Passaic County, New Jersey, charging [Mapes] with murder. Also received was a judgment of conviction entered upon [Mapes'] plea of *non vult*. The court found [Mapes] guilty of the prior murder specification under R.C. 2929.04(A)(5).

At the sentencing phase of the trial, [Mapes] made a statement on his own behalf, but presented no other witnesses. The jury returned a recommendation that the death penalty be imposed. The trial court sentenced [Mapes] to death on the two counts of aggravated murder and to terms of imprisonment on Counts Four, Five, and Six, to run consecutively.

The State Court Proceedings

As noted above, on direct appeal the Court of Appeals affirmed the finding of guilt and imposition of the death penalty, as did the Supreme Court of Ohio. *Id.*

Petitioner later filed a post-conviction petition, which was denied by the trial court. Respondent's Exhibit, hereafter

RX, Q. The decision was affirmed by the Ohio Court of Appeals. RX T. The Supreme Court of Ohio dismissed the appeal and motion to certify without opinion, RX X, and denied two motions for rehearing. RX Z, BB. The Supreme Court of the United States denied a petition for writ of certiorari. RX CC.

Mapes then filed this petition for writ of habeas corpus. In his second amended petition (SAP), he alleges 15 grounds for relief:

(1) "The representation of trial counsel fell below any objective standard of reasonable professional competence. Direct and substantial prejudice resulted from these unprofessional errors which resulted in petitioner's death sentence. Petitioner was denied the effective assistance of counsel guaranteed by the state and federal constitutions." SAP at 11.

(2) "The representation of appellate counsel fell below any objective standard of reasonable professional competence in that counsel failed to recognize numerous nonfrivolous appellate issues. Direct and substantial prejudice resulted in that petitioner's conviction and death sentence were affirmed. As a result of these errors and this prejudice, petitioner was denied the effective assistance of appellate counsel as guaranteed by the state and federal constitutions." SAP at 35.

(3) "Statements made by the court, prosecution and defense counsel during voir dire, closing argument and instructions contained in the jury charge son misinformed the jury and diminished their sense of responsibility as to give rise to violations of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution." SAP at 62.

(4) "Petitioner's right to meaningful appellate review of the death sentence was denied because the record is devoid of any mitigation and because the reviewing court would not have articulated and considered the mitigating factors even if they had been present." SAP at 68.

(5) "Petitioner's state and federal constitutional rights are violated by the death sentence imposed in this case because the aggravated felony-murder conviction is based on imputed intent rather than petitioner's own specific intent." SAP.

(6) "Petitioner was convicted and sentenced by a jury that was neither fair and impartial nor composed of a fair cross section of the community, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution," and "Culling the jury of death penalty opponents results in a jury which is more prone to convict the defendant and is therefore not impartial." SAP at 76.

(7) "The trial court accepted the recommendation of death from the jury in spite of the fact that the jury poll raised a substantial question about the unanimity of the verdict. Petitioner's sentence of death is therefore in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution." SAP at 82.

(8) "Petitioner's right to a fair trial was violated as the result of the trial judge's bias and prejudice." SAP at 85.

(9) "The trial court erred when it found petitioner guilty of the aggravating circumstance at a hearing wherein the court entertained nothing but evidence of the prior *non vult* plea in spite of the fact that the record suggested a realistic likelihood that petitioner did not commit a prior purposeful killing. In so limiting the hearing the court violated the due

process and cruel and unusual punishment provision of the Federal Constitutions [sic]." SAP at 86.

(10) "Use of petitioner's *non vult* plea to a prior New Jersey homicide as the death specification to the Ohio aggravated murder charge violated Rule 11(B)(2), Ohio Rules of Criminal Procedure, and Rule 410, Ohio Rules of Evidence. The trial court recognized a *non vult* plea and relied upon it in deciding that petitioner was guilty of the specification in the case at bar. This was in specific violation of the Ohio Rules of Evidence and the Ohio Rules of Criminal Procedure, and constituted a violation of due process and equal protection under the federal constitution. The state court finding that the trial court did not relay upon The *non vult* plea is not supported by and specifically contradicted in the record." SAP at 88.

(11) "Ohio Revised Code §2929.03 requires the use of the same jury at both trial and penalty phase in a capital case. This requirement is unconstitutional as it denies petitioner due process of law, a fair and impartial jury, the effective assistance, and the equal protection of the law in violation of the Sixth and Fourteenth Amendments to the United States Constitution. Further, the Eighth Amendment to the United States Constitution is violated because such a procedure results in arbitrary and capricious impositions of death." SAP at 91-92.

(12) "The jury verdicts returned in this case are inherently inconsistent and constitute a due process violation. A sentence of death under such circumstances is arbitrary and capricious and constitutes a violation of the Eighth Amendment to the United States Constitution." SAP at 92.

(13) "Petitioner was denied due process of law by the state court prosecutors' cumulative conduct including the suggestion of petitioner's homosexuality, comment upon his

right not to testify, and introduction by innuendo of uncharged misconduct." SAP at 93.

(14) "Petitioner was denied due process of law and an impartial jury by the trial court's refusal to grant individual sequestered voir dire." SAP at 95.

(15) "Petitioner was entitled to be represented by counsel at his arraignment on the charges for which he stood trial and was indicted. He was not and this violates due process." SAP at 98-99.

Each of petitioner's 15 grounds for relief fall into one of three categories: (1) the ground relates only to the guilt phase; (2) the ground relates only to the sentencing phase; (3) the ground is a hybrid in that it relates to both phases, *e.g.*, the ineffectiveness of counsel grounds. Discussion of the 15 grounds will be divided, more or less chronologically, into the guilt phase, then the sentencing phase. A hybrid ground will be partially discussed in the guilt phase and partially discussed in the sentencing phase. Thus, the 15 grounds will not be discussed in the numerical order presented by petitioner.

I. Procedural Issues

A. Exhaustion (Ground 2)

Respondent has moved to dismiss the petition for failure to exhaust available state court remedies in accordance with 28 U.S.C. §2254(b) and (c). Respondent argues that petitioner has not exhausted his state remedies with respect to his claim of ineffective assistance of appellate counsel (Ground 2). Thus, respondent argues that the federal habeas corpus petition should be dismissed while petitioner exhausts these remedies in the state court, pursuant to *Rose v. Lundy*, 455 U.S. 509, 522 (1982).

On February 19, 1992, approximately one year after this petition had been filed, the Supreme Court of Ohio established the following procedure to raise the claim of ineffective assistance of appellate counsel, *State v. Murnahan*, 63 Ohio St.3d 60 (1992):

> Claims of ineffective assistance of appellate counsel may be raised in an application for reconsideration in the court of appeals or in a direct appeal to the Supreme Court pursuant to Section 2(B)(2)(a)(iii), Article IV of the Ohio Constitution ....
>
> Where the time period for reconsideration in the court of appeals and direct appeal to the Supreme Court has expired, a delayed claim of ineffective assistance of appellate counsel must first be brought in an application for delayed reconsideration in the court of appeals where the alleged error took place, pursuant to App. R. 26 and 14(B), and if delayed reconsideration is denied then the defendant may file for delayed appeal in the Supreme Court, pursuant to Section 8, Rule II of the Rules of Practice of the Supreme Court.

Id. at ¶¶2, 3 of syllabus.

Petitioner did not follow the then unknown *Murnahan* procedures. Instead, he had sought to raise the issue of ineffective assistance of appellate counsel in his motion for post-conviction relief. RX P. The court of common pleas denied his claim on procedural grounds. RX Q, at 6. On appeal, the Court of Appeals of Ohio, Eighth District, denied the issue on procedural grounds. RX T, at 6-7. Petitioner attempted to appeal this and other issues to the Supreme Court of Ohio, *see* RX U, at 8-9, but the Supreme Court

refused to accept jurisdiction on the ground that no substantial constitutional question was presented. RX X.

On July 31, 1990, petitioner filed a motion for rehearing in the Ohio Supreme Court, which was denied September 5, 1990. RX Y.

On November 23, 1990, petitioner filed a "Motion for Reconsideration in Light of Conflict Certification of *State v. Murnahan*," pointing out that there was conflict among the Ohio courts of appeals regarding claims of ineffective assistance of appellate counsel, and that the Ohio Supreme Court had just accepted certification of the *Murnahan* case on that issue. RX AA. The Supreme Court denied this motion on December 19, 1990. RX BB. Petitioner then filed his original petition for a writ of habeas corpus in this court on January 10, 1991, more than one year prior to the *Murnahan* decision.

Prior to *Murnahan*, the proper procedure under Ohio law to raise the issue of ineffective appellate counsel was not clear, *Manning v. Alexander*, 912 F.2d 878 (6th Cir. 1990). In *Manning*, the petitioner raised a claim of ineffective assistance of appellate counsel in a post-conviction petition in the Ohio Court of Common Pleas, which was denied. He appealed to the Ohio Court of Appeals, which ruled *sua sponte* there was no cognizable claim of ineffective assistance of appellate counsel in a post-conviction relief action pursuant to Ohio Revised Code §2953.21. Manning was denied leave to appeal to the Supreme Court of Ohio, on the basis that the appeal did not present a substantial constitutional question. He then filed a federal habeas corpus petition. *Id.*, at 880. The district court dismissed Manning's petition, finding he had not exhausted state remedies. *Id.* The Sixth Circuit reversed, stating:

State prisoners must exhaust their state remedies prior to raising claims in federal habeas corpus proceedings. 28 U.S.C. §2254(b), (c); *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). The exhaustion requirement is satisfied when the highest court in the state in which the petitioner was convicted has been given a full and fair opportunity to rule on the petitioner's claims.... "The factual and theoretical substance of a claim must be presented to state courts to render it exhausted for federal habeas corpus purposes." ...

This case concerns only the issue of whether Manning exhausted his state remedies regarding his ineffective assistance of appellate counsel claim. We believe that he did. Manning first sought review of his ineffective assistance of appellate counsel claim in an Ohio Common Pleas Court which denied his petition. He then raised the issue in the Ohio Court of Appeals which held that he improperly raised his claim under Ohio procedural laws. He then sought review in the Supreme Court of Ohio, *inter alia*, of the procedural decision of the Court of Appeals and his claim of ineffective assistance of appellate counsel. The Supreme Court of Ohio dismissed his appeal and Manning sought relief under 28 U.S.C. §2254.

* * *

In this case...Manning pursued an appropriate remedy when he filed his §2953.21 petition and followed through with his claim to the Supreme Court of Ohio. To exhaust his or her remedies, a petitioner for federal habeas corpus relief is only required to raise his claims before the state's highest court. The fact that the state court does not address the merits of the claim does not preclude a finding of exhaustion. *Harris v. Rees*, 794 F.2d 1168, 1173 (6th Cir. 1986).

> Whatever refinements the Supreme Court of Ohio makes in this area of Ohio procedure are, of course, matters of state law. For the purposes of federal habeas corpus's exhaustion requirement, however, we hold that Manning adequately presented his ineffective assistance of appellate counsel claim to the Supreme Court of Ohio. As a result, the Supreme Court of Ohio had a full and fair opportunity to consider the claims raised in Manning's petition for habeas corpus relief. Consequently the exhaustion requirements of 28 U.S.C. §2254 and *Rose v. Lundy*, 455 U.S. 509 ... were fulfilled by Manning.

Id. at 880-83.

Under *Manning*, petitioner exhausted his state remedies. A change in substantive state law occurring after a federal habeas corpus petition is filed does not trigger a re-exhaustion requirement. *Crisp v. Mayabb*, 668 F.2d 1127 (10th Cir. 1981), *cert denied sub nom., Fields v. Paul M.*, 459 U.S. 827 (1982). *Manning* indicates Mapes is not required to return to state court. Petitioner has exhausted state remedies.